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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONTINENTAL MANORS, INC.,

Petitioner,

v.

MARGARET M. HECKLER, Secretary of Health and Human Services, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Respondents' arguments in opposition depend upon erroneous assertions of fact. When these are exposed, the arguments are seen to be without merit.

1. Contrary to respondents' contentions, petitioner's due process claim is simply that it was denied any effective opportunity to be heard before termination of its provider status. The claim is very different from the claims made in *American Healthcare Corp.* v. *Schweiker,* 688 F. 2d 1072, *cert. denied,* No. 82-839 (Feb. 22, 1983), and from the claim as respondents have restated it.

The argument that petitioner's claim is not "colorable" rests upon the erroneous assertion that Mr. Nathanson, respondents' reviewing officer, understood petitioner's

evidence by some means other than examining it directly (Br. 9). He had no such means. There was no conference. No synopsis, no summary, no statement ever went to him. Nothing sent to Mr. Nathanson so much as hinted that petitioner had made written submissions pointing out inspectional errors and corrections made and in process. There was not even the list of previously asserted deficiencies to enable him to know of the improvements, as required by 42 C.F.R. § 405.1515. The only "factual" material submitted to him was the deficiency list compiled by Mrs. Leak exclusively from the reports of federal inspectors and without regard to petitioner's evidence. Nothing but that and a draft of a letter affirming termination ever went to Mr. Nathanson. Respondents have not disputed the district court's finding that he considered only the reports of the federal inspectors (Pet. App. A23-A24, #31). Yet they base their arguments here on a contrary statement of facts.

2. Respondents' argument that the termination was consonant with the statute rests upon the erroneous assertion that the reconsidered decision "expressly affirmed the Department's initial 'immediate jeopardy' finding." (Br. 12). The reconsidered decision (Pet. App. A41-42) contains nothing remotely capable of such an interpretation. The sole basis it states is that the facility "is not in compliance with all the applicable Medicare Conditions of Participation." Nor, contrary to respondents' assertion (Br. 12), did the court of appeals make any such statement, at Pet. App. A3 or elsewhere. Moreover, Mr. Nathanson was never made aware of the contents of either the initial decision of Mr. Leak containing the finding of "immediate jeopardy" or the asserted deficiencies upon which she based the finding. Thus, he could not be considered to have "affirmed" it, and the district court expressly found that he did not (Pet. App. A36, ¶ T). Because scarcely half of the defici-

encies that Mrs. Leak stated were "important" to her initial finding of "immediate jeopardy" reappeared in the new list, a new evaluation would have been required to support any new "immediate jeopardy" finding. None was made.

The reconsidered decision was based solely upon the Department's policy that it will terminate if a single "condition" is not met, regardless of threat or jeopardy to patients and regardless of the facility's progress in correcting deficiencies (Pet. App. A18, #17). The termination based upon a failure to meet all "conditions" (Br. 2, 42 U.S.C. § 1395cc(b)(2)(A), (B)) ignores the procedural safeguards imposed by § 1395cc(f)(2). That policy and the reconsidered decision based upon it contravene the express terms of § 1395cc(f)(2), which are "clear and mandatory" in directing the Department to allow time to correct deficiencies and a hearing before termination for failure to satisfy a condition except where there is an "immediate jeopardy" determination.

3. Respondents' attempt to distinguish *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), rests upon the erroneous assertion that jurisdiction there was based upon the Secretary's waiver of exhaustion and concession of the finality of low-level administrative decisions (Br. 13). In fact, he vigorously contested those issues in the district courts and courts of appeals, just as in this case. Only in this Court did he concede the correctness of the lower courts' rulings on that jurisdictional issue (442 U.S. at 703).

Yamasaki further develops the principles enunciated in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). In *Salfi*, this Court held that when further exhaustion by a claimant would be futile, the Secretary may deem final his decision as to procedures and waive further exhaustion. In *Eldridge*,

this Court held that the courts may deem the Secretary's decision final and waive exhaustion when the Secretary refuses to do so. Waiver by the courts is determined by a balancing test between the claimant's interest in having a particular issue resolved promptly and the needs and orderly functioning of the Department.

Yamasaki involved a challenge to procedures resulting from a Departmental policy of general application. In the several district and circuit courts, the Secretary argued lack of jurisdiction until after exhaustion. However, further administrative challenge to the procedures would have been futile. The district and circuit courts held that the claimants' interest in having their challenges to the Secretary's procedures resolved promptly required waiver of exhaustion and the immediate exercise of jurisdiction.

Similarly, in the present case, petitioner challenges a procedural policy of general application. The reconsidered decision terminated its provider status without opportunity to correct deficiencies or any hearing. It was based solely upon the policy that any failure to satisfy any condition of participation required such termination, even without any "immediate jeopardy" determination. Although that policy conflicts directly with the statute, 42 U.S.C. § 1395cc(f)(2), each level of the Department will adhere to it, so that further agency review is futile as well as wasteful to both petitioner and the Department.

4. Respondents' only argument against the exercise of mandamus jurisdiction under 28 U.S.C. § 1361 is made by their erroneous statement that this case is "identical" to *Americana, supra* (Br. 14). In fact, the only real similarity is in the manner in which respondents have restated the questions presented for review so as to obscure them. Unlike petitioner, *Americana* went to court with administrative determinations that the court of appeals held to be

the equivalent of "immediate jeopardy" findings (Pet. App. A75, n. 18). *Americana* argued that 42 U.S.C. § 1395cc (f)(2) mandated the correction opportunity and a hearing before termination even in "immediate jeopardy" cases. This petitioner has never made such an argument. *Americana* came to court after proceedings in which their submissions were considered and weighed by respondents' officials (*Americana* Pet. 9, e.g.). This petitioner's evidence was not considered by the deciding official.

The lower courts in the *Yamasaki* litigation held that 28 U.S.C. § 1361 provided jurisdiction (442 U.S. at 688, 689, 690 and 691).[1] The present case is identical in principle to *Yamasaki*. However, if there is no jurisdiction under 42 U.S.C. § 405(g), then it exists under 28 U.S.C. § 1361.

CONCLUSION

For the reasons stated above and in the petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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1. *Elliott* v. *Weinberger*, 371 F. Supp. 960, at 967-968 (D. Hawaii, 1974), and 564 F. 2d 1219 at 1255-1228 (9th Cir., 1977); *Mattern* v. *Weinberger*, 377 F. Supp. 906 at 914 (E.D. Pa., 1974), and 519 F. 2d 150 at 155-157 (3d Cir., 1975).